FEB 2) 1956
HAROLD B. WILLEY, C

No. 722

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1955

Appellate Docket

WESLEY COFFMAN,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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INDEX

	Page
Petition For A Writ of Certiorari	1
Citation to Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
How Federal Question is Presented	5
Reasons for Granting the Writ	5
Conclusion	8
Appendix A— Objections to Admissibility of Petitioner's Confession; Ruling of Court Thereon; Promise of Probation to Petitioner	1a
Appendix B— Journal Entries in the Supreme Court of Ohio, and Assignments of Error in that Court	14a

CASES CITED

Herman, Commonwealth of Pa., ex rel. v. Claudy, — US —, 24 Law Week 4055	2, 5-6
Helvering v. Clifford, 309 US 331	7

AUTHORITIES

28 USC 1257 (3)	2
Revised Code of Ohio, Sec. 2951.04	5

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THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled cause on January 11, 1956.

CITATION TO OPINIONS BELOW

The Supreme Court of Ohio did not write an opinion; XXIX OHIO BAR No. 3 for January 16, 1956 at page 35; 164 OS 461, (this may be found in the advance sheets of the Ohio Reports in XXIX OHIO BAR No. 5 for January 30, 1956).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered of record in that Court on January 11, 1956 (R. P. 1). A timely application for rehearing was filed in The Supreme

Court of Ohio on January 17, 1956 (R. P. 2). Application for re-hearing was denied by the Supreme Court of Ohio on January 25, 1956 (R. P. 2). The jurisdiction of this Court is invoked under 28 USC 1257 (3) because this case involves a right, privilege, and immunity claimed under the Constitution of the United States.

QUESTION PRESENTED

In a state criminal prosecution the defendant claimed that he confessed to the offense charged because the assistant prosecuting attorney promised him that probation would be given to him in exchange for his confession; the assistant prosecuting attorney admitted that he had discussed probation with the defendant as well as the law of the State concerning the offense alleged to have been committed by the defendant but insisted that the promise of probation (which he did not deny making) was made by him to the defendant after the defendant had confessed, thereby raising this Federal Constitutional question — Must a State court in this type of a criminal case in view of the decision of this Court in *Herman, Commonwealth of Pa., ex rel* v. *Claudy*, — US —, 24 Law Week 4055, decided by this Court on January 9, 1956, hold a hearing on the merits of the case itself to determine whether or not the Federal Constitutional Rights of the defendant have been violated?

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States is Involved in this case.

STATEMENT OF THE CASE

Wesley Coffman, the petitioner herein, and William Schmitt were jointly indicted in the Court of Common

Please of Hamilton County, Ohio for the crime of rape. Both pleaded not guilty and after the trial without a jury to the Honorable Otis R. Hess, one of the Judges of the Court of Common Pleas of Hamilton County, Ohio, they were found guilty as charged and each were sentenced to be confined in the Ohio Penitentiary for a period of not less than three (3) nor more than twenty (20) years. Appeals were taken by both to the Court of Appeals of Hamilton County, Ohio, wherein the judgment of the Court of Common Pleas of Hamilton County, Ohio, was affirmed (R. Pages 6 & 7). Both Coffman and Schmitt then filed in The Supreme Court of Ohio A Motion For Leave to Appeal to it from the judgment of the Court of Appeals of Hamilton County, Ohio (R. Page 1) and also an Appeal As Of Right from the judgment of the Court of Appeals of Hamilton County, Ohio. (R. Page 1). The Supreme Court of Ohio overruled The Motion For Leave to Appeal (R. Page 1) and dismissed The Appeal as of Right (R. Page 2) on the grounds that no debatable constitutional question was involved.

Schmitt is now in the Ohio Penitentiary serving his sentence and is not a party to these proceedings. Coffman the petitioner herein, is at liberty on bond, The Supreme Court of Ohio having withheld its mandate of affirmance and having granted to him a stay of execution pending the disposition of this matter. This latter action by the Supreme Court of Ohio does not appear in the record and the reason it doesn't appear in the record is that the Clerk of The Supreme Court of Ohio by letter dated February 3, 1956, advised counsel for the petitioner herein that "The Chief Justice made an oral statement to the Clerk instructing him to withhold issuance of said mandate. If you deem it necessary you may use this letter in reference to same."

To properly acquaint this Court with the case before the Supreme Court of Ohio the following summary is given:

The testimony at the trial in the Court of Common Pleas of Hamilton County, Ohio, was stenographically reported in the form of a Bill of Exceptions of 144 Pages which was certified to by the trial judge as containing all of the testimony and all of the evidence in the case, and which has also been certified by the Clerk of The Supreme Court of Ohio as being part of the record before that Court.

According to the testimony of the Prosecutrix (Bill of Exceptions, Pages 3-29), she and the defendant Schmitt had been boy friend and girl friend for some time. On the night of February 25, 1955, she and her boy friend, Schmitt, had a date. They went for a ride and then, as the boys and the girls will do, they "parked". Her story then takes this unusual twist; a masked man with a gun then came out of nowheres; forced his way into the car; and compelled her boy friend, Schmitt, to drive the three of them to a secluded spot. After they reached this secluded spot, she goes on to say, the masked man forced her boy friend to have intercourse with her; then, her story continues; the masked man had intercourse with her. Then she related, they all three of them—she, her boy friend, and the masked man—all left this secluded rendezvous in her boy friend's automobile. On their return the car got stuck in the mud and the masked man got out and left. The record shows that the prosecutrix (after this alleged attack had occured, R. page 17) was left alone for some five minutes but made no attempt to escape.

The police came into the case when called by the parents of the prosecuting witness; the petitioner was eventually contacted and on the basis of a promise made to him by Donald Roney, Assistant Prosecuting Attorney of Hamilton County, Ohio that he would be given probation if he confessed (Bill of Exceptions, Pages 44 & 45), he confessed. At this point the attention of the Court is respectfully di-

rected to the fact that Ohio law forbids probation for a person convicted of the crime of rape. Revised Code of Ohio, Section 2951.04. There was no evidence other than the coerced confession to connect petitioner with the crime charged.

HOW FEDERAL QUESTION IS PRESENTED

The federal question in this case was raised by objection to the admissibility of the petitioner's confession on the grounds that it was not voluntary on Page 38 of the Bill of Exceptions; was considered by the Trial Court on Pages 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 51 of the Bill of Exceptions and was decided against the petitioner on Page 52 of the Bill of Exceptions. For the convenience of the Court those pages are printed verbatim in Appendix "A".

The Federal Question in this case was presented to the Supreme Court of Ohio (this will be found in the part of the record immediately following the Application for Re-Hearing and in Appendix B) by Assignment of Error No. 1, which reads as follows:

> "1. The trial court committed reversible error by admitting the confession of Wesley Coffman into Evidence, and the Court of Appeals committed reversible error by affirming the judgment of the trial court in that regard".

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to strengthen, fortify and emphasize the decision of this Court in *Herman, Commonwealth of Pa., ex rel* v. *Claudy*, —US—, 24 Law Week 4055.

In that case this language was used:

> "(1) A conviction following trial on a plea of guilty, extorted by violence or mental coercion is invalid under the Federal Due Process Clause.

(2) Where a denial of these constitutional protections is alleged in an appropriate proceeding by factual allegations not patently frivolous, or false on a consideration of the whole record, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations". *Herman, Commonwealth of Pa., ex* v. *Claudy*, —US—, 24 Law Week, 4055 at 4056.

Analyzing the case at bar with the rule of the *Herman* case the following is established:

(1) An appeal where a constitutional question has been raised in the trial court is "an appropriate proceeding" to determine whether or not constitutional rights have been violated.

(2) The allegations made by the petitioner herein and and in the trial and in the Supreme Court of Ohio are not "patently frivolous or false on a consideration of the whole record".

(a) No one denies that the petitioner made a confession (Bill of Exceptions, Page 45)

(b) No one denies that objection to the introduction of the confession was timely made (Bill of Exceptions, Page 38—Appendix "A").

(d) On Page 77 of the Bill of Exceptions, Donald Roney, (the Assistant County Prosecutor to whom petitioner made his confession in return for Roney's promise that probation would be given petitioner if he confessed) admitted: ". . . at that time I told him that I would tell the Court and/or the probation department or anyone else that Wesley Coffman had been very co-operative and he had done the best he could to right the wrong that had taken place".

Here are all of the elements that command a state court to hold a hearing to determine whether a defendant's constitutional rights have been violated. The command of this Court in the Herman case was brought to the attention of the Supreme Court of Ohio in the Application for Re-Hearing (which is a part of the record and which appears at the end of the third typewritten page of the record) and was ignored by the Supreme Court of Ohio. To keep state courts in line in cases like this certiorari definitely should be granted.

Disregarding form and looking at substance, *Helvering* v. *Clifford*, 309 US 331, there is no practical difference between a conviction following trial on a plea of guilty extorted by violence or mental coercion, and a conviction following trial on a plea of not guilty where the basis of the latter conviction is the admissibility into evidence of a confession that has been extorted by violence or mental coercion. The results in both cases are the same:

(1) The accused is convicted.

(2) The requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States have been ignored.

Petitioner's confession was the result of mental coercion: he confessed because an Assistant County Prosecutor promised probation to him if he would do so. At the time that the Assistant County Prosecutor made this promise to the petitioner said prosecutor was well aware of the fact that he was making a promise that he couldn't possibly keep: the statute law of Ohio, Section, 29501.04 of the Revised Code of Ohio, specifically forbids probation in this type of a case. Therefore, the petitioner was placed in the role of the father of the kidnapped child who pays a ransom to the kidnapper in the fond hope and belief that his child will be released unharmed only to discover later to his sorrow

that his child has been murdered and his money dissipated. The analogy is apt, appropriate, and a sound reason for granting certiorari.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari to the Supreme Court of Ohio should be granted.

All of which is respectfully submitted by,

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Attorney for Petitioner

APPENDIX A

OBJECTIONS TO ADMISSIBILITY OF PETITIONER'S CONFESSION; RULING OF THE COURT THEREON; PROMISE OF PROBATION TO PETITIONER.

BILL OF EXCEPTIONS
Pages 38 through 52 Inclusive
Pages 76 and 77

(38)

MR. McILWAIN: If your Honor please, before we go on, this is what is referred to as a confession, as your Honor knows, and I would like to be heard in reference to the voluntariness of it before it's admitted in evidence.

THE COURT: Well, that's all right. Nothing wrong with that. Go ahead.

CROSS EXAMINATION BY MR. McILWAIN:

Q Lieutenant Sullivan, you were present during the entire course of the conversation between Mr. Roney, Coffman concerning these happenings the night before?

A That's right.

Q And you heard Mr. Roney tell Wesley Coffman that if he went ahead and gave a statement or gave a confession that he would be out on bond by 6:00 o'clock?

A No, no; I don't remember anything like that.

Q Was there any conversation about making bond if he gave him a statement?

(39)

A There might have been a question about bond after Wesley Coffman had made an admission.

A No. In other words, he was threatened with that, you mean?

Q Was he told that there were two charges that would be placed against him?

A No, I don't remember that.

Q Don't remember that?

A No.

Q Were you present when he was allowed to call his wife from Mr. Roney's office?

A Yes, um-hum.

Q Did you hear what the conversation was between him and his wife?

(42)

A No, I wouldn't be able to recall that.

Q Did you hear him tell his wife that Mr. Roney told him he'd make probation if he gave this statement?

A No.

Q Did you hear him tell his wife that he gave the statement?

A I couldn't answer that. I don't recall hearing that.

Q Well, now, you knew that he had talked with me earlier that morning, right?

MR. SCHOETTMER: I'll object; completely immaterial.

THE COURT: Sustained.

Q When Coffman was there in your office, Lieutenant, did he tell you that I had told him not to make any statements?

MR. SCHOETTMER: Objection.

THE COURT: He may answer.

A He wasn't in my office.

Q Well, I mean in Mr. Roney's office. He told you that, didn't he?

A That's correct, um-hum.

Q And what did you say to him or what did Mr. Roney say to him in reference to that?

A Nothing in reference to what you said to him, no.

Q And you don't remember exactly what was said in reference to probation?

A No, no.

(43)

MR. McILWAIN: I'd like to offer Mr. Coffman in reference to the promises made in Mr. Roney's office, your Honor, before the confession goes further.

THE COURT: All right.

(Witness excused.)

WESLEY COFFMAN, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. McILWAIN

Q Will you state your name?

A Wesley Coffman.

Q You've got to talk louder than that. Wesley Coffman.

THE COURT: Just a minute. Does the previous witness remain in the courtroom? I think there was a motion, wasn't there?

MR. McILWAIN: There was.

THE COURT: A motion for a separation.

MR. SCHOETTMER: Well, he's still going to testify. Better go out.

THE COURT: I understand.

(Last witness leaves the courtroom.)

By Mr. McIlwain:

Q Well, now, Wesley, what is your address?

A 2019 VanZandt Road, North College Hill.

Q Now I'll call your attention specifically to the time when you were in Mr. Roney's office here in the court house on

(44)

February 24, 1955. Do you remember that?

A Yes, sir.

Q Who was present?

A Roney and Sullivan.

Q And what was said to you in reference—or what, if anything, was said to you by Mr. Roney in reference to a confession?

A Well, when I first walked in there he told me to sit down and have a cigarette. And the first thing I said was my attorney, Mr. McIlwain, told me not to say anything or sign anything. He said, "Well, it shouldn't be that way." He says, "We've got a statement from Bill. He said everything against you." He says, "We don't want you; you have no police record. Bill has a record." He says, "We want him; we're going to get him."

Q What, if anything, else did he say?

A He said, "You should be home with your wife and kids; you've got a home, kids, new car," says, "we don't want you." He said, "Now I have two charges here, three to five and one to twenty." He brought me over, opened the book and showed them to me. Said, "Now you tell us what we want to know, and I'll see that you make probation, and I can have you out of here on bond at 6:00 o'clock tonight providing you tell us what we want to know."

Q And was there any conversation in reference to your job?

A Yes, there was. He said—I asked him about my job. He said, "Don't worry about that. I'll call out there and everything will be taken care of."

(45)

Q Was that before or after you made a statement?

A That was before.

Q And after you made a statement were you permitted to call your wife?

A I was.

Q And then in the presence of Lieutenant Sullivan did you have a conversation with her?

A I did.

Q And what was that in reference to?

A About the probation. I called my wife, and Sullivan was standing right by the table. And I told her, I says, "Honey, I made a confession."

She said, "What did you do that for?"

And I told her, "Well, he promised me probation, three years probation, and that's the reason I made it."

MR. McILWAIN: That's all I'd like to offer in reference to him at this time. You may cross examine.

CROSS EXAMINATION BY MR. SCHOETTMER:

Q Did you sign a written statement?

A No, sir.

Q Well, you said they told you up in the room that you had to make a statement in order to get probation. Didn't they tell you you had to make a signed statement?

A No, sir.

Q And they never asked you to sign a statement, did they?

A No, sir.

Q They didn't force you to, tell you you had to?

A No, sir.

Q You just refused to sign one, isn't that right?

A He didn't even ask me to sign one.

Q Well, didn't they ask you originally and say that it would be reduced to writing and that you would sign it?

A No, sir.

Q Didn't say that at all?

A No.

Q And they just told that you would [illegible] bation if you made a statement of what happened?

A Yes, sir.

Q Did they tell you at any time that if made a statement you would not be charged with this crime?

A No, sir.

Q Never said that. So that you knew if you made a statement in which you implicated yourself you would be charged with a crime, didn't you?

A I didn't know it.

Q Well, you were reasonably sure of it, weren't you?

A Not at that charge; I didn't think it would be that charge. I knew it would be some kind of a charge, but I didn't know it would be a rape charge.

Q Well, at the time you were in Roney's office you knew

(47)

you had committed a crime, didn't you?

A No, sir.

Q Well, you knew something had been done to Juanita Slaughter, didn't you?

A Yes, sir.

Q I want to get that straight, though, that these men, whatever they said to you, there was never a promise to get you off if you made a statement?

A He said he'd see that I got probation.

Q Well, you fully knew that probation comes after an indictment, didn't you, after you were convicted of a crime? Didn't you know that?

A No, sir.

Q Well, what would probation be for then?

A Providing I made the statement against my brother-in-law.

Q Well, you realize, don't you, that in probation you

have to [illegible] with something before you can be placed upon pr[illegible]n? Don't you know that?

A I d[illegible]t know it. He had me coming and going. I didn't k[illegible] what I was doing.

Q They were confusing you, were they?

A Yes.

Q Were they asking you a lot of fast questions, is that it?

A Yes, sir.

Q Did they offer you any other gifts besides the

(48)

cigarettes?

A Nothing but the probation. He said he didn't want me; I should be home with my wife and kids.

Q But you're sure they never said you'll never be charged with a crime about this, did they?

A No.

Q In fact, they pointed it out to you in the book, "If you make a statement you're going to be charged with either this crime or this crime." Is that what they said?

A There's three to five and one to twenty. They didn't say what it was for.

Q Well, they pointed out two statutes; is that what you're telling the Court they did?

A Yes, sir.

Q And you said you'd make a statement, isn't that right?

A Yes, sir.

Q Did either of them threaten you in any way?

A He said, "Do you think that your brother-in-law will support your wife and kids while he's pulling your time?"

Q Who said that?

A Roney.

Q Roney. All right.

(49)

A He said, "From talking to your wife's people," he

says, "I think that your wife's people are against you"; says, "You better get ahold of your wife on the phone and talk to her."

Q Is that when you called her?

A No. It was after I made the statement.

Q Well, did they refuse to let you call her?

A At first, yes.

Q Did you ask to talk to your attorney when you went into the office?

A No, because he wasn't around.

Q Well, why did you go to the office? Why were you there?

A They called me down there.

Q And you went voluntarily?

A They come up and got me.

Q Well, did they take you in under arrest?

A Yes, sir.

Q You were under arrest at the time, were you?

A Well, suspicion. I imagine it would be the same thing as arrest.

Q Well, where were you just before coming down when you made the statement?

A Upstairs in a cell.

Q You were in a cell?

A Yes, sir.

Q And they brought you downstairs?

(50)

A Yes, sir.

Q And you had talked with your attorney the night before, you say?

A Yes, sir. We were locked up together, my brother-in-law and I.

Q Now, did you ask to talk to him this morning in particular?

A No, sir.

Q On February 24?

A Oh, 24th? Yes, sir.

Q Did you ask Mr. Roney to find him?

A No.

Q Well, did you ask Mr. Sullivan to find him?

A No, sir.

Q Well, did you ask the fellow that brought you down to find him?

A No, sir. Out at the shop the buddy I worked with told my wife and then he—my wife got in touch with McIlwain.

Q All right. I understand that. But what I'm thinking of, this morning you were in Roney's office did you ask to use the telephone to call Mr. McIlwain?

A No, sir.

Q Well, you testified here before that in giving this statement you were going against his orders. Isn't that right?

A Yes, sir.

(51)

Q You testified that he told you not to make any statement?

A That's right.

Q And you were going against that statement?

A Yes, sir.

Q Now, did you feel that you had to call Mr. McIlwain first?

A I should have.

Q Well, at the time we're trying to get to what you were thinking that morning in Roney's office. Did you try to call Mr. McIlwain?

A No, sir, 'cause he give me so many promises that's the reason I didn't.

Q But what you said, though, was a correct statement, wasn't it?

A Which one was that?

Q The one you made to Sullivan and Roney.

MR. McILWAIN: I'm objecting to that question, if your Honor please.

THE COURT: Sustained.

Q But no physical force in the way of a beating was ever applied to you, was it?

A No, sir.

MR. SCHOETTMER: I think that's all.

A (Continued) Just a lot of fast talking.

(52)

THE COURT: Is that all?

MR. McILWAIN: That's all. Step down.

(Witness excused)

MR. SCHOETTMER: I would like one more question.

THE COURT: Anything further on the question of the confession?

MR. McILWAIN: I have nothing else on that now, your Honor.

THE COURT: The witness may be called that was on the stand previously—Mr. Sullivan, I believe. He will be permitted to say what took place and what was said by the defendant Coffman. The objection to his testimony on the ground that it was a forced confession—I will take it that is the consideration, Mr. McIlwain.

MR. McILWAIN: That is correct.

THE COURT: —will be overruled.

(76 and 77)

CROSS EXAMINATION OF DONALD RONEY BY MR. McILWAIN, ATTORNEY FOR DEFEND ANT, WESLEY COFFMAN

Q And what was said in reference to probation at that time to Coffman?

A Well, after we had talked to Wesley a while and showed him the exhibits and one thing and another and he had told us, given us a statement, then the question had come up what would happen to him and whether or not he would get probation and what would my attitude be. At that time I told him that I would tell the court and/or the probation department or anyone else that he, Wesley Coffman, had been very cooperative and he had done the best he could to right the wrong that had taken place.

APPENDIX B

JOURNAL ENTRIES IN THE SUPREME COURT OF OHIO AND ASSIGNMENTS OF ERROR IN THAT COURT

JOURNAL ENTRIES: (R. Page 2)

Journal No. 41 p. 663 Wednesday, January 11, 1956

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal No. 41, p. 663 (R. Page 2) Wednesday, January 11, 1956

MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT.

It is ordered by the Court that this motion be, and the same hereby is, sustained.

Journal No. 41, p. 667 (R. Page 2) Wednesday, January 11, 1956

APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $.....

ORDERED, That a special mandate be sent the Court of Common Pleas of Hamilton County, to carry this judgment to Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry".

Journal No. 41, p. 677 (R. Page 3) Wednesday, January 25, 1956

REHEARING DOCKET

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

ASSIGNMENTS OF ERROR

1. The trial court committed reversible error in admitting the confession of Wesley Coffman into evidence; and the Court of Appeals committed reversible error in affirming the judgment of the trial court in that regard.

This appears in the record following the Application For Rehearing.

APR 21 1956
HAROLD B. WILLEY, Clerk

No. 722

In the

United States Supreme Court

October Term, 1955

WESLEY COFFMAN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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INDEX

		Page
I.	Citation to Opinions Below	1
II.	Question Presented	1
III.	Constitutional Provisions Involved	2
IV.	Statement of the Case	2
V.	Argument	2
VI.	Conclusion	6

TABLE OF CASES CITED

Brink vs. U. S. 60 Fed. (2d) 231, certiorari denied, 53 Sup. Ct. 291, 287 U.S. 667	5
Stembridge vs. Ga., 343 U.S. 541, at 547	5
Magnum Co. vs. Coty, 262 U.S. 159	5
Grayson vs. Harris, 267 U.S. 352, at 358	5
Portland Ry. Co. vs. Rd. 229 U.S. 397, at 412	5
Fry Roofing Co. vs. Wood, 344 U.S. 157, at 160	5

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SUPREME COURT OF THE UNITED STATES

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

I. CITATIONS TO OPINIONS BELOW

Opinions below are adequately set forth in the petition.

II. QUESTION PRESENTED

The question presented in petitioner's brief and in his arguments are difficult for respondent to understand. We assume, however, the petitioner's issue to be, is it necessary for a state court to hold a hearing to determine whether or not the federal constitutional rights of the defendant have been violated?

III. CONSTITUTIONAL PROVISIONS INVOLVED

Respondent contends that there is no constitutional provision involved.

IV. STATEMENT OF THE CASE

The petitioner, Wesley Coffman, and his brother-in-law, William Schmitt, were jointly indicted in the Common Pleas Court of Hamilton County, Ohio, for the crime of rape. Both pleaded not guilty; both waived trial by jury and their cases were tried to the court; both were found guilty as charged and both appealed to the First District Court of Appeals and the convictions were sustained. An Appeal of Right and a Motion for Leave to Appeal were filed in the Supreme Court of Ohio. The Supreme Court of Ohio dismissed the Appeal as of Right and overruled the Motion for Leave to Appeal.

In the trial court the state offered a witness to testify to a conversation with the petitioner. Before this evidence was received the attorney for Wesley Coffman requested and was permitted the right to interrogate that witness and then called petitioner to inquire as to whether or not the conversation was voluntary. All this was done prior to receiving the conversation in evidence. On the basis of this inquiry the court permitted the conversation to be admitted as it applied to the petitioner's case.

V. ARGUMENT

We contend that the issue raised is a moot question because the trial court did conduct a hearing to determine the constitutional rights of the defendant. (Petitioner's Brief, Appendix A.) This testimony was made a part of the record and considered by the trial court and appellate courts.

It is contended by the petitioner that the decision in the case of *Herman, Commonwealth of Pa., ex rel.* v. *Claudy*, 24 Law Week, 4055, is the basis of this writ. We submit the law in the *Herman* case does not apply to the case at bar because the *Herman* case considered (1) a habeas corpus proceeding, (2) wherein the trial court denied a hearing to the petitioner, and (3) the hearing of the trial court was summarily denied solely because the prosecuting attorney filed an answer contradicting the allegations of the petition, no testimony having been received. The case at bar is not (1) a habeas corpus proceeding, (2) the trial court did not deny hearing on any issue of the case. Petitioner's Appendix A quotes part of the record of the testimony of the trial court, pages 38 through 52 and pages 76 and 77. We submit there was a complete and thorough hearing of all issues and questions involved and that the petitioner was not limited or curtailed in his examination, and (3) it cannot be contended that the petitioner's claim in the trial court was summarily dismissed on an answer filed by the prosecuting attorney because the prosecuting attorney did not file such an answer. It is, therefore, our contention that the law in the *Herman* case does not apply to the case at bar.

We cannot logically analyze petitioner's brief, but we do not think he is contending that the appellate court committed error by failing to call witnesses to testify at the hearing on appeal. This appeal in the appellate court was not one for trial denovo.

As long as there was a complete hearing in the trial court, a complete review orally and on briefs in the appellate court, briefs filed and an oral hearing and rehearing in the Supreme Court of Ohio, we cannot understand what further hearing the petitioner would be entitled to that would cause a federal question to be involved.

Petitioner, in his brief, page 6, subsection (d), quotes one of the witnesses unfairly. He quotes only a part of the answer of the witness. We refer the court to his brief, page 13a, for a full quotation of that statement which definitely shows that the conversation referred to in said quote took place after the defendant had given his statement and also explained the reason for the statement being given. We further contend that if a defendant gives a statement to a police officer and after the statement has been given a discussion then takes place as to possible penalties, that such a statement as to penalties does not make the prior admissions inadmissible.

We must contradict the statement in petitioner's brief, page 5, that there was no evidence other than the confession to connect petitioner with the crime charged. We respectfully refer to page 60 of the record which relates a complete statement of William Schmitt wherein he connected Wesley Coffman in detail with the entire crime. At pages 75 and 91 he again identifies Wesley Coffman with the crime. There is also a great amount of circumstantial evidence throughout the record proving the petitioner's part in the crime.

We do not agree that a federal question is presented, and further contend that the petitioner did not preserve the issue for appeal. The basis of that argument is contained in the record, page 38, (Petitioner's Brief, Appendix A) where Mr. McIlwain, petitioner's attorney, requested:

> "If your Honor please, before we go on, this is what is referred to as a confession, as your Honor knows, and I would like to be heard in reference to the voluntariness of it before it's admitted in evidence."

At the end of interrogation by Mr. McIlwain, Record P. 52, petitioner's Appendix A, 12a, the atorney then stated:

> "I have nothing else on that now, your Honor."

It will be noticed that the petitioner *did not make an objection* to the testimony being offered, he merely asked for permission to interrogate the witness as to whether or not the admissions had been made voluntarily. We also wish to call to the attention of the court that *there was no exception taken* when the court permitted the testimony to be received. We, therefore, contend that on this issue there is nothing presented to this court for review. *Brink* v. *U. S.* 60 Fed. (2d) 231, certiorari denied, 53 Sup. Ct. 291, 287 U. S. 667; *Stembridge* v. *Ga.*, 343 U. S. 541, at 547.

Even if a question is presented, which we deny, we submit that the exhibits, the testimony and the admissions were convincing beyond any doubt of the guilt of the petitioner. We submit that the decisions of the trial court and the two appellate courts were correct.

It has been the rule of this court that a writ will not be granted merely to give a defeated party another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159. Nor will the court review a decision on a question of fact. *Grayson* v. *Harris*, 267 U. S. 352, at 358; *Portland Ry. Co.* v. *Rd.* 229 U. S. 397, at 412; *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, at 160.

Petitioner's brief argues, page 5, "Certiorari should be granted to strengthen, fortify and emphasize the decision in the *Herman, Commonwealth of Pa., ex rel.* v. *Claudy*" case. We do not interpret Supreme Court Rule 19 to include this as a reason to grant a writ.

It is, therefore, our contention that no issue was raised in the trial court which would involve a federal question; that no objection or exception was taken in the trial court to the testimony now objected to; that the trial court was fully justified in its finding; that the petitioner was proven guilty beyond any doubt and that there is no legal reason for a writ to be issued by this court.

VI. CONCLUSION

For the above reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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